A **PANG MUN CHUNG & ANOR v. CHEONG HUEY CHARN**

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
YAACOB MD SAM JCA
HARMINDAR SINGH DHALIWAL JCA
B [CIVIL APPEAL NO: W-04(NCVC)(W)-346-08-2017]
6 APRIL 2018

C ***CONTRACT:*** *Illegality – Agreement – Sale and purchase agreement entered into between non-citizen vendor and purported purchaser to defeat bank policy of not granting loans to non-citizens – Whether amounted to illegality – Whether internal bank policy – Whether could be equated to public policy protecting members of public – Whether there was public policy barring claim of purported vendors – Whether there were elements of deception or serious moral turpitude on part of purported vendors in entering impugned arrangements – Whether purported purchaser held property on trust for purported vendors – Whether purported vendors*
D *sought only to enforce trust – Element of disproportionality if remedy of enforcement of trust not granted – Whether purported purchaser would gain windfall or profit from own wrongdoing – Whether High Court Judge wrong in application of defence of illegality – Contracts Act 1950, s. 24(e)*

E ***TRUSTS:*** *Enforcement of – Agreement – Sale and purchase agreement entered into between non-citizen vendor and purported purchaser to defeat bank policy of not granting loans to non-citizens – Whether purported purchaser held property on trust for purported vendors – Whether purported vendors sought only to enforce trust – Element of disproportionality if remedy of enforcement of trust not granted*

F This appeal was primarily concerned with the rather contentious issue of the application of the defence of illegality and public policy in relation to an action brought to enforce a trust. The appellants ('the plaintiffs') filed an action in the Sessions Court seeking to enforce a trust and claim for the surplus monies received by Hong Leong Bank Berhad ('the bank'), as a result
G of a property ('the said property') sold at a public auction. The facts were that the plaintiffs needed to raise capital for a business venture but the bank's internal policy was not to grant loans to non-citizens, thus the first plaintiff, as non-citizen, was unable to obtain loan. The plaintiffs then applied for a loan by using a sale and purchase agreement ('the SPA') and the assistance of the respondent ('the first defendant'). The plaintiffs and the first defendant
H executed the said SPA whereby the first defendant purchased the said property. Notably, no monies were paid under the SPA and it was orally agreed that the first defendant was to hold the property on trust for the plaintiffs. As planned, the first defendant applied for a loan from the bank and was duly granted. The loan was secured by a charge on the said property.
I The plaintiffs undertook the repayment of the loan. Subsequently, the plaintiffs faced financial constraints and repayments to the bank ceased. The bank foreclosed on the property and at an auction, the property was sold with a surplus sum of RM431,201.11 from the proceeds of the auction. The first

defendant did not proceed to collect the surplus funds which were made available by the bank. The plaintiffs then proceeded to file a civil action in the Sessions Court, seeking for a declaration that the first defendant was holding the said property on trust for them and that they were therefore entitled to the surplus funds held by the bank. The first defendant became interested in the surplus and responded by filing a defence and a counterclaim. The Sessions Court found for the plaintiffs and accepted that the said property was held on trust for the plaintiffs. The surplus funds were ordered to be released to the plaintiffs. Dissatisfied with this decision, the first defendant appealed to the High Court. The first defendant argued that the SPA was a sham transaction which was void pursuant to s. 24(e) of the Contracts Act 1950 ('the Contracts Act'). The High Court held that it would not assist the plaintiffs in enforcing the transfer arrangement or trust which was borne out of a sham or illegal agreement. The High Court noted that to dismiss the plaintiffs' claim on illegality might lead to an 'unfair outcome' in that the first defendant would be rewarded with a 'windfall', but accepted that such an outcome would be the inevitable consequence of the illegality or sham agreement. As a consequence, the High Court allowed the first defendant's appeal. Hence, the plaintiffs appealed.

Held (allowing appeal with costs; setting aside order of High Court)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) In identifying with precision the nature of the public policy which may call into question the transactions to which the parties were involved, the only allegation of breach of public policy herein was that the plaintiffs and the first defendant had contrived to defeat the bank's policy of not granting loans to foreigners. This, however, was an internal bank policy, which could very well have been for the bank's own purpose. It could hardly be argued that the policy was there for the public benefit or that non-compliance of which would have a tendency to be injurious to the public welfare. The failure to establish the reasons for the bank's internal policy was fatal to the first defendant's case. The bank's policy could not equate to a public policy protecting members of the public. It remained a policy of a private body. (paras 39-42)

(2) The totality of the evidence did not suggest any element of deception on the bank or any serious moral turpitude on the part of the plaintiffs in entering into the impugned arrangements. It could not be said with any conviction that the SPA and the trust arrangement, together with the loan agreement, were transactions opposed to public policy. The plaintiffs were merely trying to re-finance the said property to secure funds for a proposed business. Their objective was not to deceive the bank but rather to comply with the bank's policy of not providing loans to non-citizens. The plaintiffs were not trying to nullify the SPA and the loan agreement but sought only to enforce the trust. The plaintiffs continued to pay the bank all payments due for a period of 15 years until

A the said property was foreclosed with a large surplus remaining. The bank had certainly no cause for complaint and public welfare had not been affected. (paras 45-47)

(3) This court was unable to discern any public policy which would bar the claim of the plaintiffs or the remedy they were seeking. The denial of
B a loan to the plaintiffs on the ground that one of them was a non-citizen did not offend public policy. Also significant was the element of disproportionality that would arise if the remedy of enforcement of the trust was not granted. The first defendant would then be gaining a windfall, or in other words, she would profit from her own wrongdoing.
C The public policy of denying the first defendant an unjust windfall must take precedence over whatever policy advanced in favour of applying the illegality defence. The High Court Judge was plainly wrong in his application of the defence of illegality resulting in a serious misdirection on the facts and the law. This court was compelled to intervene.
D (paras 78, 79, 83 & 84)

Bahasa Malaysia *Headnotes*

Rayuan ini berkenaan isu pemakaian pembelaan kepenyalahan undang-undang dan polisi awam berhubung tindakan untuk menguatkuasakan satu
E amanah. Perayu-perayu ('plaintif'-plaintif') memfailkan tindakan di Mahkamah Sesyen memohon penguatkuasaan amanah dan menuntut dana lebihan yang diterima oleh Hong Leong Bank Berhad ('bank'), akibat jualan satu hartanah ('hartanah tersebut') melalui lelongan awam. Fakta-fakta adalah plaintif-plaintif perlu mengumpulkan modal untuk usaha perniagaan tetapi polisi dalaman bank tidak memberi pinjaman kepada bukan
F warganegara, oleh itu, plaintif pertama, sebagai bukan warganegara, tidak dapat memperoleh pinjaman. Plaintif-plaintif kemudiannya memohon pinjaman dengan menggunakan satu perjanjian jual beli ('PJB') dan pertolongan responden ('defendan pertama'). Plaintif-plaintif dan defendan pertama melaksanakan PJB tersebut di mana bawah PJB ini, defendan
G pertama membeli hartanah tersebut. Tiada wang dibayar bawah PJB ini dan disetujui secara lisan bahawa defendan pertama memegang hartanah sebagai amanah untuk plaintif-plaintif. Seperti yang dirancang, defendan pertama memohon pinjaman daripada bank dan memperolehinya. Pinjaman dicagar dengan gadaian atas hartanah tersebut. Plaintif-plaintif menanggung bayaran
H balik pinjaman. Seterusnya, plaintif menghadapi kekangan kewangan dan bayaran balik kepada bank dihentikan. Bank menutup gadai janji atas hartanah dan semasa lelongan, hartanah dijual dengan jumlah lebihan RM431,201.11 dari hasil lelongan. Defendan pertama tidak mengambil dana berlebihan yang disediakan bank. Plaintif-plaintif memfailkan tindakan sivil
I di Mahkamah Sesyen, menuntut deklarasi bahawa defendan pertama memegang hartanah tersebut secara amanah untuk mereka dan oleh itu mereka mempunyai hak atas dana berlebihan yang dipegang oleh bank. Defendan pertama, berminat terhadap dana berlebihan itu dan memfailkan

pembelaan dan tuntutan balas. Mahkamah Sesyen memutuskan memihak kepada plaintif-plaintif dan menyatakan bahawa hartanah tersebut dipegang secara amanah untuk plaintif-plaintif. Dana berlebihan diperintahkan dilepaskan kepada plaintif-plaintif. Tidak puas hati dengan keputusan ini, defendan pertama merayu ke Mahkamah Tinggi. Defendan pertama menghujahkan bahawa PJB adalah transaksi palsu yang tidak sah menurut s. 24(e) Akta Kontrak 1950 ('Akta Kontrak'). Mahkamah Tinggi memutuskan bahawa ia tidak akan menolong plaintif-plaintif menguatkuasakan pengurusan pindah milik atau amanah yang ditanggung daripada satu perjanjian pura-pura atau yang menyalahi undang-undang. Mahkamah Tinggi menyatakan untuk menolak tuntutan plaintif-plaintif atas kepenyalahan undang-undang akan membawa kepada 'hasil yang tidak adil' di mana defendan pertama akan diberi ganjaran satu 'durian runtuh', tetapi menegaskan bahawa implikasi sebegitu akan berlaku dan tidak dapat dielakkan akibat perjanjian yang menyalahi undang-undang atau palsu. Dengan itu, Mahkamah Tinggi membenarkan rayuan defendan pertama. Oleh itu, plaintif-plaintif merayu.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan perintah Mahkamah Tinggi)
Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Dalam menentukan ketepatan sifat polisi awam yang boleh mempersoalkan transaksi-transaksi yang melibatkan pihak-pihak, satu-satunya dakwaan berlakunya pelanggaran dasar awam adalah apabila plaintif-plaintif dan defendan pertama berusaha untuk mematahkan polisi bank untuk tidak memberi pinjaman kepada warga asing. Ini, walau bagaimanapun, adalah satu polisi dalaman bank, untuk tujuan bank itu sendiri. Polisi itu bukan untuk kepentingan orang awam atau ketidakpatuhannya memudaratkan kebajikan awam. Kegagalan untuk membuktikan alasan-alasan polisi dalaman bank menjejaskan kes defendan pertama. Polisi bank tidak boleh disamakan dengan polisi awam yang melindungi orang awam. Ini kekal sebagai polisi badan swasta.

(2) Keseluruhan keterangan tidak menggambarkan apa-apa elemen penipuan atas bank atau apa-apa keburukan moral yang serius pada pihak plaintif-plaintif dalam memasuki pengurusan-pengurusan yang dipersoalkan. Tidak boleh dinyatakan dengan apa-apa keyakinan bahawa PJB dan pengurusan amanah, bersama dengan perjanjian pinjaman, adalah transaksi-transaksi yang bertentangan polisi awam. Plaintif-plaintif hanya cuba untuk membiayai semula hartanah tersebut bagi mendapatkan dana untuk satu perniagaan yang dicadangkan. Objektif mereka bukan untuk menipu bank tetapi untuk mematuhi polisi bank yang tidak memberikan pinjaman kepada bukan warganegara. Plaintif-plaintif tidak cuba membatalkan PJB dan perjanjian pinjaman tetapi hanya menuntut penguatkuasaan amanah. Plaintif-plaintif membuat bayaran kepada bank

untuk tempoh 15 tahun sehingga hartanah tersebut ditutup gadai janji dengan baki dana berlebihan yang agak besar. Bank tidak mempunyai sebab untuk membuat aduan kerana kebajikan awam tidak terjejas.

(3) Mahkamah ini tidak dapat melihat apa-apa polisi awam yang dapat melarang tuntutan plaintif-plaintif atau remedi yang dituntutnya. Penafian pemberian pinjaman kepada plaintif-plaintif atas alasan bahawa salah seorang daripada mereka adalah bukan warganegara tidak melanggar polisi awam. Elemen tak berkadaran yang akan timbul jika remedi penguatkuasaan amanah tidak diberikan juga penting. Defendan pertama akan mendapat 'durian runtuh', atau dalam erti kata lain, dia akan mengaut keuntungan dari kesalahannya sendiri. Polisi awam yang menafikan defendan pertama daripada mendapatkan 'durian runtuh' yang tidak adil mesti mengambil keutamaan atas apa jua polisi yang dianjurkan memihak kepada penggunaan pembelaan kepenyalahan undang-undang. Hakim Mahkamah Tinggi jelas terkhilaf dalam pemakaian pembelaan kepenyalahan undang-undang mengakibatkan satu salah arah yang serius atas fakta-fakta dan undang-undang. Mahkamah ini wajib campur tangan.

Case(s) referred to:

Bilta (UK) Ltd v. Nazir (No 2) [2015] UKSC 23 ***(refd)***
Bowmakers Ltd v. Barnet Instruments Ltd [1945] 1 KB 65 ***(refd)***
Brett Andrew Macnamara v. Kam Lee Kuan [2008] 7 CLJ 625 HC ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Holman v. Johnson (1775) 1 Cowp 341 ***(refd)***
Hounga v. Allen [2014] UKSC 47 ***(refd)***
Les Laboratories Servier v. Apotex Inc [2014] UKSC 55 ***(refd)***
Loo Hon Kong v. Loo Kim Lim [2004] 4 CLJ 1 CA ***(refd)***
Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***
Mustafa Osman v. Lee Chua [1996] 3 CLJ 494 CA ***(refd)***
Nelson v. Nelson [1995] 184 CLR 538 ***(refd)***
Palaniappa Chettiar v. Arunasalam Chettiar [1962] AC 294 ***(refd)***
ParkingEye Ltd v. Somerfield Stores Ltd [2013] 2 WLR 939 ***(refd)***
Patel v. Mirza [2016] UKSC 42 ***(refd)***
Richardson v. Mellish (1824) 2 Bing 229 ***(refd)***
Sajan Singh v. Sardara Ali [1960] AC 167 ***(refd)***
Saunders v. Edwards [1987] 1 WLR 1116 ***(refd)***
St John Shipping Corp v. Joseph Rank [1957] 1 QB 267 ***(refd)***
Suntoso Jacob v. Kong Miao Ming & Anor [1986] 2 MLJ 170 ***(dist)***
Theresa Chong v. Kin Khoon & Co [1976] 1 LNS 165 FC ***(refd)***
Ting Siew May v. Boon Lay Choo [2014] SGCA 28 ***(refd)***
Tinker v. Tinker [1970] 1 All ER 540 ***(refd)***
Tinsley v. Milligan [1993] 3 All ER 65 ***(not foll)***

Legislation referred to:

Contracts Act 1950, ss. 24(e), 66

Criminal Justice Act 1993 [UK], s. 52

Other source(s) referred to:
Cheshire and Fifoot's Law of Contract, 8th edn, p 256

For the appellants - Ronnie Yoon Kok Seng & Jeffrey Wong Peng Ann; M/s Scully Yoon
For the respondent - Paari Perumal & M Ramachandran; M/s Rama Samuel & Assocs

[Editor's note: For the High Court judgment, please see Cheong Huey Charn v. Pang Mun Chung & Anor [2018] 1 CLJ 491 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Harmindar Singh Dhaliwal JCA:

Introduction

[1] This is an appeal against the decision of the Kuala Lumpur High Court delivered on 7 August 2017. The High Court had reversed the decision of the Sessions Court which decision was delivered on 27 October 2016 after a full trial.

[2] This appeal is primarily concerned with the rather contentious issue of the application of the defence of illegality and public policy in relation to an action brought to enforce a trust. When parties in litigation seek to enforce a contract, the illegality defence is sometimes taken, as it was in this action, to deprive the plaintiff of a remedy and perhaps, as this case has shown, reward the defendant with a windfall.

[3] When seeking to establish the illegality defence, reference will invariably be made to the seminal statement of Lord Mansfield CJ in *Holman v. Johnson* (1775) 1 Cowp 341: "No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act" derived from the Latin maxim *ex turpi causa non oritur actio*. As we shall see, this maxim, which traditionally governed the defence of illegality, became a strict rule of policy with no room for exercise of discretion by the court.

[4] For two centuries after Lord Mansfield's pronouncement, the courts have come up with divergent and sometimes inconsistent approaches in confronting the defence of illegality leading to criticisms of uncertainty, arbitrariness and lack of transparency. The approaches adopted were designed mainly to mitigate the harshness of the *ex turpi causa* principle which, in some instances, led to unfair outcomes and consequences.

[5] Lord Neuberger PSC, in *Bilta (UK) Ltd v. Nazir (No. 2)* [2015] UKSC 23, characterised the issue as "epitomizing the familiar tension between the need for principle, clarity and certainty in the law with the equally important desire to achieve a fair and appropriate result in each case".

[6] Some years earlier, Lord Bingham LJ, in *Saunders v. Edwards* [1987] 1 WLR 1116, in expressing his misgivings as to the rule, offered a glimpse as to the solution required (at p. 1134):

> Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct.

[7] Not surprisingly then, the law in this area has been in a state of flux and it will become necessary to deal fully with the legal principles that are applicable to the present appeal. But first, some background to the present appeal. The appellants here had filed an action in the Sessions Court Kuala Lumpur seeking to enforce a trust and claim for the surplus monies received by Hong Leong Bank Berhad ("the bank"), the second defendant, as a result of a property sold at a public auction. After a trial, the Sessions Court allowed the appellants' claim. Being dissatisfied, the respondent here (first defendant at the trial) filed an appeal to the High Court. In the High Court, the respondent relied on the defence of illegality which sufficiently persuaded the learned judge to allow the appeal and set aside the judgment entered by the Sessions Court.

[8] It was now the turn of the appellants here to feel aggrieved by the decision and hence this appeal. At the hearing of the appeal on 10 January 2018, and after having read the written submissions as well as hearing oral arguments on the issues raised, we indicated to the parties that we would deliver our decision on a date to be informed. This is now our unanimous decision. For convenience, the parties will be referred to as they were in the court of first instance.

The Relevant Facts

[9] The relevant facts leading to the filing of the action are not complicated and are well set out in the judgments below. The salient facts can be summarised as follows. The plaintiffs were the registered owners of a property known as No. 37, Lorong Badang 13, Taman Castlefields, 57100 Kuala Lumpur ("the property"). They had purchased this property from their mother who, together with her husband ("Mr Phang"), continued to reside in the said property until they were compelled to vacate after the property had been sold at an auction on 17 December 2014. After the auction, there was a surplus sum of RM431,201.11 held by the bank which became the subject matter of the dispute.

[10] So what led to the property being auctioned? The narrative must begin with the relationship between the parties. The first plaintiff and the second plaintiff are siblings. The first plaintiff and the first defendant were at one time involved in a romantic relationship with each other. This lasted for a few years. The plaintiffs had intended to raise capital for a laundry business

to be run by Mr Phang. Financing was to be obtained from a financial institution by using the said property. Unfortunately, the plaintiffs encountered a difficulty. The first plaintiff was a permanent resident of Malaysia. He was a non-citizen. Apparently, it was the bank's internal policy not to grant loans to non-citizens.

[11] So what did the plaintiffs do next? They decided to apply for a loan by using a sale and purchase agreement ("the said SPA") and the assistance of the first defendant, who was at that time, involved romantically with the first plaintiff. The plaintiffs and the first defendant executed the said SPA whereby under this SPA, the first defendant purchased the said property for a consideration of RM95,000. The property then came to be registered in the name of the first defendant. Notably, no monies were ever paid under the SPA and it was orally agreed that the first defendant was to hold the property on trust for the plaintiffs notwithstanding the transfer of the said property.

[12] Subsequently, as planned, the first defendant applied for a loan of RM76,000 from the bank which was duly granted. The loan was secured by a charge on the said property. It had been agreed that the plaintiffs and their family members will undertake the repayment of the loan. As agreed, monthly repayment of the instalment sum of about RM700 and all payments for quit rent, utility bills and assessment were made by the plaintiffs for a period of almost 15 years.

[13] After about 15 years, the plaintiffs faced financial constraints. Repayments to the bank ceased. The bank decided to foreclose on the property. The property was scheduled to be auctioned on 28 March 2014. The auction was called off when the plaintiffs made a payment of RM10,200 to the bank. Unfortunately, the financial constraints of the plaintiffs continued. Another auction was fixed for 17 December 2014. This time the property was sold with a surplus sum of RM431,201.11 from the proceeds of the auction. The bank is now holding this sum pending disposal of this appeal.

[14] Now, as it turned out, the first defendant did not proceed to collect the surplus funds which were made available by the bank sometime in April 2015. By this time, she was no longer on friendly terms with the first plaintiff. The first plaintiff made various efforts to contact the defendant. He was unsuccessful. The first plaintiff even took the unusual step of lodging a police report after it became clear that no response was going to be forthcoming by the first defendant.

The Proceedings In The Courts Below

[15] The plaintiffs then proceeded to file this civil action in the Sessions Court in February 2016. Essentially, they were seeking for a declaration that the first defendant was holding the said property on trust for them and that they were therefore entitled to the surplus funds now held by the bank. The first defendant, by this time, became interested in the surplus funds. She responded by filing a defence and counterclaim.

[16] At the end of the trial, the Sessions Court found for the plaintiffs. The court accepted that the said property was held on trust for the plaintiffs. The court noted that the plaintiffs and their family members had made all payments in relation to the said property including the loan repayment to the bank. Judgment was accordingly entered in favour of the plaintiffs. The net effect was that the surplus funds were ordered to be released to the plaintiffs.

[17] Being dissatisfied with this decision, the first defendant appealed to the High Court. There was no appeal by the bank. The bank took the position that it will abide by the order of the court as to who was entitled to the surplus funds.

[18] Now, in the Sessions Court, the first defendant did not take the position that the impugned SPA was a sham arrangement. She claimed that she was indeed a genuine purchaser. She claimed that the said property had passed to her and that she was entitled to the surplus funds.

[19] In the High Court, however, she adopted a contrary position. She now argued that the SPA was sham transaction which was void pursuant to s. 24(e) of the Contracts Act 1950 ("the Contracts Act"). The High Court accepted this line of argument and allowed the appeal. The learned judge found that the real reason that the SPA was entered into was to get the bank to approve the loan which the first plaintiff was not entitled to being a foreigner holding a red national registration identity card. The court found that the first plaintiff knew that the bank had a policy against giving loans to non-citizens and the impugned SPA was a means to circumvent this obstacle.

[20] Relying mainly on the cases of *Tinker v. Tinker* [1970] 1 All ER 540; *Suntoso Jacob v. Kong Miao Ming & Anor* [1986] 2 MLJ 170 ("*Suntoso*"); *Mustafa Osman v. Lee Chua* [1996] 3 CLJ 494 and *Tinsley v. Milligan* [1993] 3 All ER 65; [1994] 1 AC 340, the learned judge held that the court will not assist the plaintiffs in enforcing the transfer arrangement or trust which was borne out of a sham or illegal agreement.

[21] The court noted that to dismiss the plaintiffs' claim on illegality might lead to an "unfair outcome" in that the first defendant will be rewarded with a "windfall". The court however accepted that such an outcome would be the inevitable consequence of the illegality or sham agreement. As a consequence, the appeal was allowed and the order of the Sessions Court was set aside. There was no order as to costs on account that the first defendant was a party to the illegal agreement.

The Instant Appeal

[22] Before us, the plaintiffs raised a host of issues to contend with the issue of illegality and the attendant issue of unjust enrichment. The issues, as set out in the submissions, appeared as follows:

(i) Whether the first defendant's counsel had approbated and reprobated the first defendant's position by running two different arguments during the appeal stage at the High Court.

(ii) Whether there was in fact any evidence of illegality adduced in this case from the very beginning which was allegedly against public policy pursuant to s. 24(e) of the Contracts Act 1950.

(iii) Whether paras. 8, 9, 10, 11 and 25 of the statement of claim were really *ex-facie* illegal and/or against public policy.

(iv) Whether the principle in *Suntoso*'s case can be applied to the facts in the present case and in Malaysian jurisprudence.

(v) Whether the public interest would really be harmed by the enforcement of the so-called illegal agreement or sham agreement, namely the SPA in this particular case.

(vi) Whether the integrity of the judicial legal system would be preserved or enhanced by denying the reliefs claimed by the plaintiffs.

(vii) Whether the illegality defence raised by the first defendant is a bar to deny the plaintiffs' claim which arose from the trust that existed independently and collaterally between both the parties at all material times.

(viii) Whether the principle of unjust enrichment is applicable in this present case, if at all, the SPA was tainted with illegality.

(ix) Whether the plaintiffs had satisfied the ordinary requirements of a claim for unjust enrichment.

(x) Whether the plaintiffs were entitled to the remedy of restitution on the basis that the SPA was void *ab initio* due to the non-fulfilment of valuable consideration by the first defendant as evidenced in the instant case.

[23] In order to do justice between the parties, we considered it more appropriate to deal with the same issues in a more broad fashion as some of the issues were interrelated and had common characteristics. In any case, a more broad consideration would be more convenient and lead to greater clarity. An added reason is that consideration of some of the issues would become unnecessary in view of our determination of the principles of law that are applicable to the instant appeal.

Illegality Not Pleaded

[24] Coming now to the issues, it is perhaps appropriate to first deal with the pleading point taken by the plaintiffs. It was not disputed that the issue of illegality was not pleaded nor raised in the trial court. It was raised for the first time in the High Court when the defendant had engaged a different counsel.

[25] In this regard, although the contradictory stance taken undermines the credibility of the first defendant, we do not think that the plaintiffs' argument that the first defendant had run different arguments against the pleadings has any force. As long as all the relevant facts are before the court and no new evidence is required, the court is in fact duty-bound to take cognizance of any

illegality, even on its own motion, and even if it has not been pleaded (see *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619 ("*Merong Mahawangsa*"). In the present case, the plaintiffs had readily asserted that the purpose of the SPA and loan agreement was to avoid the bank's internal policy.

[26] Now, having raised the issue of illegality belatedly, without raising it in the pleadings and at the trial, the first defendant cannot complain if the plaintiffs now raise the issue of unjust enrichment as an answer to allegations of illegality. We note that seeking restitution on the basis of unjust enrichment would be consequent to the effect of any illegality. In our assessment, if the issue of illegality was taken at a late stage, as it was in this case, then the issue of restitution, whether under s. 66 of the Contracts Act, or as unjust enrichment, is an attendant consideration which cannot be divorced from the issue of illegality.

[27] This is borne out more of common sense and a sense of fair play between litigants as exemplified in the old adage – what is sauce for the goose must be sauce for the gander. Admittedly, this is no famous Latin maxim, but, in our view, it is most fitting as denying the plaintiff his answer to the illegality defence would be highly prejudicial and unfair.

The Law On Illegality

[28] Dealing now with the issue of illegality, we observe, at the outset, that the law in this regard can be segregated broadly into contracts that are illegal under statute (statutory illegality) or contracts which are illegal at common law. There is no suggestion in the present case of any statutory illegality. We need only concern ourselves with illegality at common law which must be grounded upon established heads of public policy as the case law suggests. This principle is also embodied in s. 24(e) of the Contracts Act which provides that any agreement of which the consideration or object is immoral or opposed to public policy is void.

[29] It may perhaps be easier to discern contracts which are prohibited by statute than those opposed to public policy. Even so, in the latter case, courts have consistently refused to uphold contracts which may be against common values held by society, or agreements which are injurious to the public welfare (see *Brett Andrew Macnamara v. Kam Lee Kuan* [2009] 7 CLJ 625).

[30] Before we deal with the legal position, it is necessary to restate some salient facts. The plaintiffs and their family members, for various reasons, could not qualify for a bank loan. Nonetheless, the plaintiffs had ownership of the said property. The plaintiffs then embarked on a plan to raise funds by entering into the SPA with the first defendant. The first defendant, as it turned out, and not surprisingly as she was involved in a romantic relationship with the first plaintiff at the time, was a willing participant to this plan.

[31] Although the first defendant had earlier claimed that it was an outright sale, it was determined by both courts below that there existed a common intention by both parties that she was to hold the property on trust. There was overwhelming evidence that she had agreed to this arrangement. For example, the evidence disclosed that the first defendant made no payment under the SPA and later no payment on the loan taken from the bank, lending credence to the claim of the existence of the trust. So the finding in this respect cannot be assailed.

[32] On this score, it can hardly be disputed that the SPA and the loan agreement with the bank were not *ex-facie* illegal. The trust arrangement by itself was not unusual and was not illegal in any manner. So too the loan agreement. However, the High Court sustained the argument that the whole arrangement was a sham to circumvent the bank's policy of not lending to foreigners and was therefore against public policy within the contemplation of s. 24(e) of the Contracts Act.

[33] It has been urged upon us that this was an erroneous finding. It then remains for us to ascertain the allegations of illegality and determine whether they infringe public policy as set out in s. 24(e) of the Contracts Act. If they do not, that would be the end of the matter. It would then be unnecessary to consider the effects of the illegality.

Whether Contract Void Under s. 24(e) Contracts Act

[34] Now, public policy is not defined under the Contracts Act. The scope and application of public policy itself has been the subject of some controversy. Leaping to mind are the famous words of Burrough J in the English case of *Richardson v. Mellish* (1824) 2 Bing 229 that public policy is a "very unruly horse, and when once you get astride it you never know where it will carry you". Notwithstanding these reservations, the Malaysian Legislature has left it to the courts to define the scope of public policy under s. 24(e) of the Contracts Act.

[35] In this connection, it may perhaps be helpful to refer to the Federal Court decision in *Theresa Chong v. Kin Khoon & Co* [1976] 1 LNS 165; [1976] 2 MLJ 253 ("*Theresa Chong*"). In that case, it was found that the appellant had acted as a remisier for the respondent in contravention of the Stock Exchange rules which required all remisiers to be registered with the Stock Exchange. Although not registered as such, the appellant entered into a series of share dealings with the respondent.

[36] Before the Federal Court, it was contended that the contracts were illegal as being contrary to public policy as there had been a violation of the Stock Exchange rules. The Federal Court did not agree and observed as follows (per Gill CJ (Malaya)):

A The arguments put forward by counsel for the respondent in contesting the appeal may be summarised as follows. The defendant did not plead that the contract was void as being opposed to public policy. For the Court to take cognizance of illegality the transaction must be illegal on the face of it. Not being registered as a remisier is not contrary to public policy because the by-laws of the Stock Exchange are the by-laws of a private B body which have no force of law. They are binding on the plaintiffs but not on the defendant. If the plaintiffs were dealing with an unregistered remisier they were committing a breach of by-law 97 of the Stock Exchange Rules which provide for a penalty. But their dealing with such a remisier did not make the contract illegal as being opposed to public policy.

C I do not think there is merit in the argument that illegality was not pleaded because a court is bound to take cognizance of it if it is of the opinion that the contract is void on the ground of being contrary to public policy. But I entirely agree with the rest of the arguments put forward by counsel for the respondent. It seems clear that the present contract does not into any of the traditional pigeonholes. It was on the basis of those D arguments that the learned trial judge found that the contract between the plaintiffs and the defendant was not illegal. In my judgment the learned judge was quite right in taking that view.

[37] On the scope of public policy, the Federal Court cited with approval a passage in *Cheshire and Fifoot's Law of Contract* (8th edn) which appeared as E follows (at p. 256):

> First, although the rules already established by precedent must be moulded to fit the new conditions of a changing world, it is no longer legitimate for the Courts to invent a new head of public policy. A judge is not free to speculate upon what, in his opinion, is for the good of the community. He must be content to apply, either directly or by way of F analogy, the principles laid down in previous decisions. He must expound, not expand, this particular branch of the law.
>
> Secondly, even though the contract is one which *prima facie* falls under one of the recognised heads of public policy, it will not be held illegal unless its harmful qualities are indisputable. The doctrine, as Lord Atkin G remarked in a leading case [1938] AC 1, 'should only be invoked in clear cases in which the harm to the public is substantially uncontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds … In popular language … the contract should be given the benefit of the doubt.

[38] The scope of public policy was again reiterated by the Federal Court H in *Merong Mahawangsa, supra* at p. 231 (CLJ); p. 640 (MLJ) in the following fashion (per Jeffrey Tan FCJ):

> It should also be said that public policy is not static. 'The question of whether a particular agreement is contrary to public policy is a question of law … It has been indicated that new heads of public policy will not be invented by the courts for the following reasons … However, the I application of any particular ground of public policy may vary from time to time and the courts will not shrink from properly applying the principle of an existing ground to any new cause of action that may arise … The

rule remains, but its application varies with the principles which for the time being guide public opinion. (*Halsbury's Law of England*, (5th edn, vol 22) at para 430).

[39] Reverting to the instant appeal, the first step, in our view, is to identify with precision the nature of the public policy which may call into question the transactions to which the parties were involved. In this respect, the only allegation of breach of public policy is that the plaintiffs, and the first defendant must be included in this, had contrived to defeat the bank's policy of not granting loans to foreigners.

[40] Now, this was, as the learned judge found, an internal bank policy. No evidence was led as to the rationale for this policy. The bank itself did not take this point at the trial. We are then left to surmise on the reasons for this internal policy. There was no evidence that it was a policy imposed by Bank Negara which would have added significance to the issue at hand. This internal policy could very well have been there for the bank's own purpose, perhaps for commercial reasons in that loans to foreigners may carry a greater risk of default and risk of recovery in the event of default.

[41] Given the dearth of evidence as to any policy objectives which affect the public interest, it could hardly be argued that the policy was there for the public benefit or that non-compliance of which would have a tendency to be injurious to the public welfare. In our assessment, the failure to establish the reasons for the bank's internal policy was fatal to the first defendant's case.

[42] In any event, and even applying the most charitable inference, the bank's policy cannot equate to a public policy protecting members of the public. In the end, since there was no evidence, it remained a policy of a private body as was held in *Theresa Chong*.

[43] It is also noteworthy, and this appears to have been overlooked all round, is that the second plaintiff and the plaintiffs' family members are Malaysian citizens. So it would certainly not shock the conscience of the public that such a loan was granted to the plaintiffs.

[44] We are also not persuaded that there was a sinister motive on the part of the plaintiffs, as the learned judge seems to imply, for initiating and executing the said transactions. The motivation for entering into the impugned transactions was stated by the first plaintiff in his evidence as noted by the learned judge at para. 49 of the judgment as follows (at p. 71 of the appeal record):

Q8. What was the reason for you and the first defendant to make plans and arrangements in order to transfer the property to her at that material time?

A8. At that material time, my family members and I decided to collect a lump sum of money for the purpose of venturing into a new business for our family members. However, because of the non-eligibility of my family members, for instance, our parents old age, the various financial commitments of our other family members and

> my non-citizen status, my brother who is the second plaintiff and I subsequently decided to refinance the property by way of transferring the property to the first defendant in order to enable her to apply for a loan on our behalf. For the said purpose, the first defendant will try to apply a higher loan amount from a bank on our behalf in order to enable us to get the remaining sum of the approved loan upon the full settlement of the redemption sum of the Property to our old financier, Mayban Finance Berhad.

[45] The totality of the evidence does not suggest any element of deception on the bank or any serious moral turpitude on the part of the plaintiffs in entering into the impugned arrangements. In all the circumstances of the case, it cannot be said with any conviction that the SPA and the trust arrangement, together with the loan agreement, were transactions opposed to public policy.

[46] In our view, far from intending to perpetrate any deception, the plaintiffs were merely trying to refinance the said property to secure funds for a proposed business. Their objective was not to deceive the bank but rather to comply with the bank's policy of not providing loans to non-citizens. In doing so, we think it was significant that the plaintiffs were not trying to nullify the SPA and the loan agreement but sought only to enforce the trust.

[47] As it turned out, although not strictly relevant, the plaintiffs and their family members continued to pay the bank all payments due for a period of 15 years until the said property was foreclosed with a large surplus remaining. The bank had certainly no cause for complaint and public welfare has not been affected. For these reasons, the argument of the transactions being opposed to public policy cannot be sustained.

The Illegality Defence

[48] Now, even if the public policy argument under s. 24(e) of the Contracts Act had some merit, the defence of illegality would remain unsustainable in principle especially in relation to the issue of restitution. In other words, even if the impugned arrangements were affected by illegality, the plaintiffs would still be entitled to relief. In this context, the learned High Court Judge relied heavily on the Singapore Court of Appeal decision in *Suntoso Jacob v. Kong Miao Ming & Anor* [1986] 2 MLJ 170 ("*Suntoso*") on the basis that the facts were "strikingly similar". We would however observe that the facts there are distinguishable from the instant case. In *Suntoso*, the plaintiff, an Indonesian, and the defendant, a Singaporean, acquired shares and became directors of a company incorporated in Singapore.

[49] Later, an agreement was entered into where the plaintiff transferred a significant number of shares to the defendant who would hold them on trust for the plaintiff. This was done to avoid certain administrative guidelines laid down by the Registrar of Ships in Singapore where foreign-owned ships could

not be registered in Singapore. A vessel would be considered as foreign-owned if half or more of the issued shares of the company were owned by foreigners. The plaintiff brought proceedings to enforce the trust.

[50] In affirming the decision of the High Court, the Singapore Court of Appeal held that the plaintiff, in transferring the shares to the defendant without any payment, had practiced a deception on the public administration. The court could not give effect to and enforce the trust in his favour.

[51] It is apparent from the facts in the present appeal that, firstly, as alluded to earlier, no deception was practiced on the bank. Secondly, even if there was any deception, it would have been against a private body and not a public administration. As such, it would not attract the public interest element required for the impugned transactions to be opposed to public policy. The facts are therefore quite different.

[52] In any case, it was noted by this court in *Loo Hon Kong v. Loo Kim Lim* [2004] 4 CLJ 1; [2004] 4 MLJ 1 that the Malaysian jurisprudence in this context is different from that in Singapore. Speaking for the court, Gopal Sri Ram JCA (as he then was) said (at p. 17 (CLJ); p. 17 (MLJ)):

> We would note in passing that by the common law of Singapore, (in which expression we include the doctrines of Equity) a resulting trust created by act of parties will not be enforced where to do so will be contrary to public policy. See, *Suntoso Jacob v. Kong Miao Ming* [1986] 2 MLJ 170; *Cheong Yoke Kuen v. Cheong Kok Keong* [1999] 2 SLR 476. However, Malaysian jurisprudence, anchored on the foundation of binding precedent as *Chettiar v. Chettiar and Singh v. Ali* [1960] MLJ 52, does not admit of such a principle.

[53] Even then, we note with interest that the law in Singapore in this regard has moved on. In *Ting Siew May v. Boon Lay Choo* [2014] SGCA 28 ("*Ting*"), the Singapore Court of Appeal held that for contracts entered into with an illegal or unlawful object, the application of the doctrine of illegality is subject to the limiting principle of proportionality. In deciding whether to grant or refuse relief for contracts affected by illegality, the principle of proportionality was to be considered as follows:

> 70. We would summarise the general factors which the courts should look at in assessing proportionality in the context of contracts entered into with the object of committing an illegal act as including the following: (a) whether allowing the claim would undermine the purpose of the prohibiting rule; (b) the nature and gravity of the illegality; (c) the remoteness or centrality of the illegality to the contract; (d) the object, intent, and conduct of the parties; and (e) the consequences of denying the claim.

[54] Now, the court in *Ting* in arriving at this "proportionality test", as we would call it, was no doubt encouraged by the decision of the English Court of Appeal in *ParkingEye Ltd v. Somerfield Stores Ltd* [2013] 2 WLR 939 ("*ParkingEye*"). The court in *ParkingEye* was similarly concerned with

looking into the policy considerations underpinning the illegality principle to assess the proportionate response to the illegality. The court upheld the rejection of the illegality defence on the basis that it would lead to a disproportionate result.

[55] This flexible approach to the doctrine of illegality appears to have now taken root in the United Kingdom with the ground-breaking decision of the UK Supreme Court in *Patel v. Mirza* [2016] UKSC 42. Interestingly, as noted earlier, the background leading to this decision goes back a few hundred years to Lord Mansfield CJ's landmark pronouncement in *Holman v. Johnson, supra* based on the *ex turpi causa maxim*.

[56] This rule, in a nutshell, disentitled recovery of money paid under an illegal contract where a plaintiff had to rely on the illegality to establish his or her cause of action. It was a rule of law based on public policy. And it was a rule of strict application such that it left no room for discretion to be exercised by the courts. As Lord Goff noted in *Tinsley v. Milligan* [1994] 1 AC 340 at p. 355:

> The principle is not a principle of justice; it is a principle of policy, whose application is indiscriminate and so can lead to unfair consequences as between the parties in litigation. Moreover the principle allows no room for the exercise of any discretion by the court in favour of one party or the other.

[57] This principle led to courts abstaining from enforcing rights derived from an illegal conduct. Not surprisingly, much contentious litigation followed for two centuries after *Holman v. Johnson* which led to inconsistent case law focusing mainly on ways to mitigate the harshness of the application of the principle.

[58] Since disentitlement only arose when reliance was placed on the illegal conduct, it meant that a claim could succeed if the elements of the claim could be proved without needing to rely on the illegality. This reliance test, as it came to be known, appears implicit from Lord Mansfield's statement in *Holman v. Johnson* (at p. 343);

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded on general principles of policy, which the defendant has the advantage of, contrary to real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to be *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and the defendant were to change sides,

and the defendant was to bring his action against the plaintiff, the latter would have the advantage of it; for where both are equally at fault, *potior est condition defendentis*.

[59] A host of subsequent cases affirmed this approach, the significant ones being the English Court of Appeal decision in *Bowmakers Ltd v. Barnet Instruments Ltd* [1945] 1 KB 65 and the Privy Council decisions from Malaysia in *Sarjan Singh v. Sardara Ali* [1960] AC 167 ("*Sarjan Singh*") and *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] AC 294 ("*Palaniappa Chettiar*").

[60] For example, in *Sajan Singh*, the plaintiff founded his claim on the right of property in the lorry and his possession of it. He was entitled to recover as he did not found his action on an immoral and illegal act. The transaction there between the plaintiff and the defendant with respect to the use of the lorry was against the law. In *Palaniappa Chettiar*, the Privy Council distinguished the case of *Sajan Singh* and held that the father who had transferred the land to his son for an illegal and fraudulent purpose was not entitled to the aid of the court to recover the land. Lord Denning, who had delivered the judgment of the Privy Council in both cases, held that the father in the latter case had to assert his own fraudulent purpose which he has fully achieved to establish his claim.

[61] These cases and many others were later the subject of much discussion in the House of Lords' decision in *Tinsley v. Milligan*, a case also relied upon by the learned judge at the High Court. The facts in *Tinsley v. Milligan* are not too dissimilar to the present case. Miss Tinsley and Miss Milligan purchased a house. Although both of them contributed to the purchase, the house was vested in Miss Tinsley's sole name so that Miss Milligan could make, and did in fact make, false benefit claims from the Department of Social Security. The parties quarrelled and Miss Tinsley moved out. She then gave Miss Milligan notice to quit and claimed possession and ownership of the house. Miss Milligan counterclaimed for a declaration that the property was held by Miss Tinsley on trust for both of them in equal shares.

[62] The English Court of Appeal, by a majority, decided in favour of Miss Milligan by applying the "public conscience" test whereby the illegality defence would only be applicable if public conscience would be affronted if the relief sought was granted. The majority of the House of Lords, although rejecting the public conscience test, upheld the decision of the Court of Appeal in that there was a common understanding that the parties owned the property equally and a resulting trust was thus established. This resulting trust was established without the need to explain why the property was conveyed into the sole name of Miss Tinsley which was to perpetrate fraud on the Department of Social Security.

[63] Applying that principle to the instant appeal, it could similarly be asserted that the plaintiffs need not rely on the reason for the sale of the property to the first defendant to establish the trust. Hence, the illegality defence would not bite. So even applying *Tinsley v. Milligan*, as the learned judge did, the outcome ought to have been in favour of the plaintiffs.

[64] However, the decision in *Tinsley v. Milligan* invited considerable criticism and generated serious debate in the United Kingdom and elsewhere. For example, proposals for law reform were instituted by the English Law Commission where it published its first consultation paper in 1999, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* (LCCP 154) which was followed by a further consultation paper in 2009, *The Illegality Defence: A Consultative Report* (LCCP 189). In its final report in 2010, *The Illegality Defence*, (Law Com 320), the Law Commission in its criticism considered that the rule on illegality generated different results which were entirely fortuitous depending on the relationship of the parties.

[65] The end result was that *Tinsley v. Milligan* was eventually overruled by the majority in *Patel v. Mirza*. And not before serious differences had earlier arisen in the UK Supreme Court as to the approach to the illegality defence in *Hounga v. Allen* [2014] UKSC 47; *Les Laboratories Servier v. Apotex Inc* [2014] UKSC 55 and *Bilta (UK) Ltd v. Nazir (No. 2)* [2015] UKSC 23 where in the latter case, Lord Neuberger expressed the need for the differences to be resolved quickly and by a panel of nine justices. That opportunity came soon enough in *Patel v. Mirza*.

Patel v. Mirza

[66] In *Patel v. Mirza*, the plaintiff Mr Patel had transferred £620,000 to the defendant Mr Mirza for the purpose of using the money to bet on share price movements using advance insider information which Mr Mirza expected to obtain. The agreement amounted to a conspiracy to commit an offence of insider dealing under s. 52 of the Criminal Justice Act 1993. The expected insider information was not forthcoming and the agreement was frustrated. Mr Patel sought for restitution of the money paid on the ground that Mr Mirza had been unjustly enriched and the basis upon which the money was paid had failed. Mr Mirza refused to pay on the ground that the agreement was tainted by illegality.

[67] The UK Supreme Court, consisting of nine justices, unanimously held that Mr Mirza should make restitution of the money. Restitution was ordered despite the taint of illegality arising from the insider dealing conspiracy as the justices considered it inappropriate to allow Mr Mirza to profit from his wrongdoing in participating in the illegality. The main basis for so holding was that "it would be contrary to the public interest to enforce the claim if to do so would be harmful to the integrity of the legal system …" (per Lord Toulson at para. 120).

[68] However, there was disagreement as to the reasoning or approach to be adopted in dealing with the illegality defence. The majority judgment delivered by Lord Toulson, with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Hedge agreed, rejected the reliance rule as adopted in *Tinsley v. Milligan* and other cases and adopted a flexible approach by reference to a set of policy considerations.

[69] This new approach advocated by Lord Toulson involved a trio of considerations, as follows (at para. 101):

> … It is not a matter which can be determined mechanistically. So how is the court to determine the matter if not by some mechanistic process? In answer to that question I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without a) considering the underlying purpose of the prohibition which has been transgressed, b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all in the area of public policy. That trio of necessary considerations can be found in the case law.

[70] This was further reiterated at para. 120:

> The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.

[71] In relation to the third matter of proportionality, Lord Toulson accepted a range of factors as follows at para. 107:

> In considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled, as a matter of public policy, various factors may be relevant. Professor Burrows' list is helpful but I would not attempt to lay down a prescriptive or definitive list because of the infinite possible variety of cases. Potentially relevant factors

A include the seriousness of the conduct, its centrality to the conduct, whether it was intentional and whether there was a marked disparity in the parties' respective culpability.

Our Decision

B **[72]** We would therefore agree that in deciding whether to grant or refuse relief for contracts affected by illegality, the essential consideration is the public interest in the integrity (and consistency) of the legal system. In assessing whether enforcement of a claim would be harmful to the integrity of the legal system and therefore contrary to the public interest, it is necessary to consider the following:

C

(i) The underlying purpose of the prohibition or reasons why the conduct was made illegal;

(ii) Other relevant public policy which would be affected by a denial of the claim;

D

(iii) Whether denial of the claim would be a proportionate response to the illegality by considering factors such as seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was a marked disparity in the parties' respective culpability.

E **[73]** We would also agree that the reliance principle set out in *Tinsley v. Milligan*, and the cases following it, should be rejected on account of the principle exemplifying the problems of arbitrariness, uncertainty and potential for injustice (see *Patel v. Mirza*, Lord Toulson, para. 24). In coming to this view, we have not overlooked the views of the minority in *Patel v. Mirza* that the discretionary approach advocated by the majority was

F "converting legal principle into an exercise of judicial discretion" leading to less clarity and certainty in the law (see Lord Sumption, *Patel v. Mirza* at para. 265 and Lord Neuberger at para. 158). However, we are more persuaded that the approach recommended by the majority is the way forward as it brings an end to the fragmented state of the law. As observed

G by Lord Kerr in *Patel v. Mirza* (at para. 123), the courts are now spared from having to "devise piecemeal and contrived exceptions to previous formulations of the illegality rule". We also think that it is an approach which is consistent with upholding the integrity and harmony of the law by achieving an equitable result based on the facts in each case.

H **[74]** In this respect as well, we note that Lord Toulson in his judgment in *Patel v. Mirza* had also examined the law in relation to the illegality defence as applied in Australia, Canada and the United States. In particular, Lord Toulson referred to with approval the High Court of Australia decision in *Nelson v. Nelson* [1995] 184 CLR 538. That was also a case where the High

I Court of Australia refused to follow the principle in *Tinsley v. Milligan* despite having the same issues with similar facts.

[75] The facts in *Nelson v. Nelson* are also similar to the present appeal and were noted by Lord Toulson in *Patel v. Mirza* at para. 50 as follows – "As the widow of a mariner who had served in World War 1, Mrs Nelson was eligible under the Defence Service Homes Act 1918 to buy a house with the benefit of a subsidy from the Commonwealth of Australia, provided that she did not own or have a financial benefit in another house. She provided money to buy a house in Bent Street, Sydney, but the transfer was taken in the names of her son and daughter. Their common intention was that Mrs Nelson should be the beneficial owner of the house. The reason for putting the Bent Street property in the names of her children was to enable her to buy another property with the benefit of a subsidy under the Act. This she did. One year later the Bent Street property was sold. By this time Mrs Nelson and her daughter had fallen out, and a dispute arose as to who was entitled to the sale proceeds. Mrs Nelson and her son brought proceedings against the daughter for a declaration that the proceeds were held by the son and daughter in trust for their mother. The daughter opposed the claim and sought a declaration that she had a beneficial interest …"

[76] Lord Toulson in *Patel v. Mirza* noted that under *Tinsley v. Milligan*, the daughter would have succeeded because Mrs Nelson would have had to refer to the illegal purpose to rebut the presumption of advancement in favour of her children.

[77] The High Court of Australia in *Nelson v. Nelson*, however, rejected the line of argument in *Tinsley v. Milligan* and held that the court should use its equitable jurisdiction to grant the declaration sought by Mrs Nelson. The court also held that enforcement of legal or equitable rights should not be refused on the ground of illegality if to do so would be disproportionate to the seriousness of the conduct or if it would not further the purpose of the statute.

[78] Coming back to the instant case, and as we had determined earlier, we were unable to discern any public policy which would bar the claim of the plaintiffs or the remedy they were seeking. The denial of a loan to the plaintiffs on the ground that one of them is a non-citizen does not offend public policy as we have found.

[79] Also significant, in our view, is the element of disproportionality that would arise if the remedy of enforcement of the trust is not granted. The first defendant would then be gaining a windfall or, in other words, she would profit from her own "wrongdoing". The first defendant now appears to be relying on such conduct to resist the claim.

[80] Added to this is the result that the first defendant would effectively be gaining this windfall from what seems to us a minor transgression when compared to the conspiracy to commit insider dealing in *Patel v. Mirza*. In

similar vein, Devlin J in *St John Shipping Corp v. Joseph Rank* [1957] 1 QB 267 at 288 asked "whether public policy is well served by driving from the seat of judgment everyone who has been guilty of a minor transgression".

[81] It is also worth noting that the element of disproportionality was initially borne out in the case of *ParkingEye* which was referred to earlier. In that case, the plaintiff ParkingEye brought a claim for repudiatory breach of a contract to provide a system of automated monitoring of car parking at the defendant's supermarkets. The system recorded vehicle registration numbers and customers were charged for overstaying. ParkingEye's remuneration from the contract came from these charges which they collected by issuing letters of demand. The defendant relied on false representations made in those demand letter to raise their defence of illegality.

[82] The plea of illegality was rejected by the court on the basis that since the form of the demand letters was collateral and distinct from the main contract, the contract was not tainted by illegality. The court also held that denial of ParkingEye's claim was not justified by the policies underlying the doctrine of illegality and would have led to a disproportionate result.

[83] In the present case, we take the view that the public policy of denying the first defendant an unjust windfall must take precedence over whatever policy advanced in favour of applying the illegality defence. In this connection, we are reminded of the oft-quoted passage in *St John Shipping Corp v. Joseph Rank Ltd* [1957] 1 QB 267 of Devlin J as follows (at p. 288):

> Although the public policy in discouraging unlawful acts and refusing them judicial approval is important, it is not the only relevant policy consideration. There is also the consideration of preventing injustice and the enrichment of one party at the expense of the other.

Conclusion

[84] In the circumstances, and in view of our judgment on the law on illegality, we find it unnecessary to deal with the other issues raised by the parties. For the reasons stated, we are constrained to hold that the learned High Court Judge was plainly wrong in his application of the defence of illegality resulting in a serious misdirection on the facts and the law. We are therefore compelled to intervene (see *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453).

[85] Accordingly, we allow the appeal with costs. The order of the High Court is set aside and the order of the Sessions Court reinstated. The deposit is to be refunded. Order accordingly.